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No. ~~91-2712~~

In The

Supreme Court of the United States

October Term, 1993

THE HAROLD WASHINGTON PARTY, ET AL.,

Plaintiffs-Petitioners,

vs.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, ET AL.,

Defendants-Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioners' failure for four months, to file a response to a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss the complaint justified a refusal to vacate the judgment of dismissal under Rule 60(b).

2. Whether the refusal to vacate the dismissal under Rule 60(b), in accordance with well settled precedent, calls for an exercise of this Court's power of supervision.

3. Whether, under Rule 23 of the Federal Rules of Civil Procedure, the involuntary dismissal of the complaint required notice to a putative class which was not and was never requested to be certified and where that contention was not raised in the district court.

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OPINIONS BELOW

1. The unreported opinion of the United States District Court entered on June 15, 1991, refusing to vacate dismissal of the complaint under Rule 60(b). (App. 14)

2. The reported opinion of the Court of Appeals entered on January 29, 1993 affirming the district court. (984 F.2d 875; App. 1)

OBJECTIONS TO JURISDICTION

The petitioners urge, disingenuously and without citation of authority, that the proceedings below so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The asserted jurisdictional ground is specious.

The decisions below were in accordance with long standing precedent and were plainly correct.

No basis for jurisdiction has been or can be asserted.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate, incomplete and materially misleading. A full and accurate statement of the case, with record references, is set forth in the brief filed by respondents in the Court of Appeals. (App. 20-31)

In short, the complaint filed in the district court was without merit and was virtually abandoned by petitioners. A Rule 12(b)(6) motion to dismiss the complaint, together with supporting memorandum, was filed by respondents on November 30, 1990. Four attorneys represented the petitioners. More than four months passed without a response to the motion, despite three orders requiring a response. On April 5, 1991, the district court dismissed the complaint. Seventeen days later, petitioners moved to vacate the dismissal under Rule 60(b)(1) claiming "excusable neglect". Only one of the attorneys for petitioners offered any excuse and his excuse was transparently inadequate to justify the total disregard for the orders of the district court. The three other attorneys never offered any reason to excuse their conduct. The Court of Appeals affirmed on January 23, 1993.

ARGUMENT

I

THERE IS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION

Both the district court and the Court of Appeals applied well settled precedent in refusing to vacate the judgment of dismissal. No constitutional deprivation is urged. No important question is presented. The decision does not conflict with the decision of any other court. There plainly has been no departure from the accepted and usual course of judicial proceeding as to call for this Court's exercise of its power of supervision. Thus, there

is absolutely no basis for this Court to take jurisdiction of this matter.

II

THE REFUSAL TO VACATE UNDER RULE 60(b) WAS PROPER AND IN ACCORD WITH WELL ESTABLISHED PRECEDENT

The issue before the Court of Appeals was whether the district court abused its discretion in refusing to vacate a judgment of dismissal under Rule 60(b). The opinion of the Court of Appeals is set forth in the Appendix hereto at page 1. Both the district court and the Court of Appeals applied well settled precedent in holding that the petitioners failed to demonstrate any basis for vacating the judgment. *Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 230 (7th Cir. 1991); *North Central Illinois Laborers' District Council v. S. J. Groves*, 842 F.2d 164 (7th Cir. 1988); *Clergy and Laity Concerned v. Chicago Bd. of Educ.*, 586 F.Supp. 1408 (N.D. Ill. 1984); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984); *Western Transportation Company v. E.I. DuPont de Nemours and Company*, 682 F.2d 1233, 1236 (7th Cir. 1982); *Kostenbauder v. Secretary of H.E.W.*, 71 F.R.D. 449 (MD Penn. 1976); *Flett v. W. A. Alexander & Company*, 302 F.2d 321 (7th Cir. 1962) *cert. denied*, 371 U.S. 841.

The district court held (App. 16-17):

> "Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the plaintiffs three months to respond to the defendants' motion to dismiss. Finally, after a month of silence following the

plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of "mistake, surprise or excusable neglect". The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to a motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied."

The Court of Appeals held (App. 12-13):

"Our review of the record does not reveal that the district court relied on forbidden factors or failed to consider any important relevant factor in denying the Plaintiffs' motion to vacate. *See Tolliver v. Northrop Corporation*, 786 F.2d 316, 319 (7th Cir. 1986). The only ground listed in Rule 60(b) addressed by the Plaintiffs was "excusable neglect". *See* Federal Rule of Civil Procedure 60(b)(1). And, as the district judge pointed out,

what may arguably have been excusable neglect on the part of the lead counsel could not excuse or explain the neglect on the part of the other three counsel of record.

* * *

When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be tempted to engage in such conduct. *See National Hockey League v. Metropolitan Hockey League Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

In this instance the Plaintiffs had four months to argue the merits of their claims. Offering their response only after judgment had been granted did not demonstrate the diligence or extraordinary circumstances necessary to invoke Rule 60(b)."

III

NOTICE OF INVOLUNTARY DISMISSAL TO THE PURPORTED CLASS WAS NOT REQUIRED

The complaint was styled as a class action. However, appellants made no attempt to obtain class certification and there is grave doubt that the complaint could ever satisfy the requirements of Rule 23. In any event, a putative class is not entitled to notice of an involuntary dismissal. *Laventhall v. General Dynamics*, 91 F.R.D. 208, 210 (E.D. Mo. 1981) *affirmed*, 704 F.2d 407, *cert. denied*, 464 U.S. 846; *Baham v. Southern Bell Tel. & Tel. Co.*, 55 F.R.D. 478 (W.D. La. 1972); *Pelelas v. Caterpillar Tractor Co.*, 113 F.2d 629 (7th Cir. 1940) *cert. denied*, 311 U.S. 700; *Partridge*

v. St. Louis Joint Stock Bond Bank, 130 F.2d 281, 286 (8th Cir. 1942) In addition, the argument was never raised in the trial court and, therefore, was waived. *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*, 508 F.2d 417, 420 (7th Cir. 1975); *Cannon v. U.S. Acoustics Corp.*, 532 F.2d 1118, 1119 (7th Cir. 1976).

The Court of Appeals further held (App. 8-9):

> "As a threshold matter, the Plaintiffs point out that because this case was filed as a Class action, the district court erred when it dismissed the complaint with prejudice without addressing the issue of class certification or notifying the putative class. *See* Federal Rule of Civil Procedure 23(c)(1). This argument raises the question of whether there is a final judgment over which this court has jurisdiction. *See* 28 U.S.C. § 1291. If the district court has indicated that it contemplates additional proceedings to address the class issue, its judgment is not final for purposes of appeal.
>
> In this case the district court never addressed the class certification issue and did not specifically reserve that question. Our cases hold that, absent a reservation of the class certification issue, the district court's failure to certify the class does not render the district court's judgment nonfinal, but merely limits the scope of the judgment in that the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants. *See*, e.g., *Rutan v. Republican Party*, 868 F.2d 943 (1989) (en banc), *aff'd in part and rev'd in part on other grounds*, 497 U.S. 62 (1990); *Currie v. Diamond Mortgage Corporation*, 859 F.2d 1538 (7th Cir. 1988); *Gomez v. Illinois State Board of Education*, 811 F.2d 1030 (7th Cir. 1987). Accordingly, we have jurisdiction to consider this appeal."

CONCLUSION

For the foregoing reasons and for the reasons urged by respondents in the Court of Appeals, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

(i)

THE OPINION OF THE COURT SOUGHT TO BE REVIEWED

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2712
THE HAROLD WASHINGTON PARTY, et al.,

Plaintiffs-Appellants,

v.

THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90-C-5731 – **Charles P. Kocoras,** *Judge.*

ARGUED JANUARY 17, 1992 – DECIDED JANUARY 29, 1993

Before FLAUM and MANION, *Circuit Judges,* and CURRAN, *District Judge.**

CURRAN, *District Judge.*

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* The Honorable Thomas J. Curran, District Judge for the Eastern District of Wisconsin, is sitting by designation.

A. BACKGROUND

The Harold Washington Party (HWP), named after a deceased Chicago mayor, is a fledgling Chicago political party whose voters, members and supporters are predominantly African-Americans. The party was founded and incorporated in Illinois as a Chicago political party in 1989. As the November 6, 1990, general election approached, the party attempted to become a political presence in Cook County, Illinois, as well as in the City of Chicago, by slating candidates for the positions of Cook County Sheriff, State's Attorney, Assessor, Clerk, Treasurer, Board President, as well as other offices.[1] Nominating petitions containing over 60,000 signatures were filed on behalf of these candidates.

The case before us arose out of the efforts of the Chicago Cook County Democratic Party (CCCDP) to remove the Harold Washington Party candidates from the Cook County November 6, 1990, general election ballot. The background of this dispute, as recounted by the

---

[1] Under Illinois law, citizens wishing to organize a "new political party" must collect approximately 25,000 signatures from voters in the political unit in which the party intends to slate candidates for office. If enough valid signatures are collected, the organization becomes a "new political party" under Illinois law. *See* Ill. Rev. Stat., ch. 46, § 10-2 (1989). If the party gathers five percent of the vote in the next election, it becomes an "established political party." *Id.* However, a "new" political party can become "established" only in the political subdivision where it has fielded candidates. Thus, prior to the November 6, 1990, general election, the Harold Washington Party was not an established party in Cook County, Illinois, even though it had become established in the City of Chicago municipal elections.

Illinois Supreme Court in a related action, evolved as follows:

> On August 6, 1990, Barbara J. Norman and others (the Party) filed petitions to place their names on the November 6, 1990, election ballot as candidates for office under the HAROLD WASHINGTON PARTY (Washington Party) name. The Washington Party candidates filed as a "new" political party in Cook County under article 10 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-1 et seq.), even though the Washington Party was already an established party in the City of Chicago. The Washington Party fielded candidates for all nonjudicial, countywide offices, and for county commissioners to be elected at-large within the City of Chicago (city commissioners), county commissioners to be elected at-large from outside the City of Chicago (suburban commissioners) and commissioners of the Water Reclamation District of Greater Chicago.
>
> Dorothy Reed and others (the objectors) filed objections to the Washington Party candidates' nomination pursuant to section 10-8 of the code, contending that the Washington Party petitions lacked the requisite number of signatures, and had failed to meet other requirements of section 10-2 of the Code (Ill. Rev. Stat. 1989, ch. 46, par. 10-2).
>
> The Cook County officers electoral board (the board) examined the objections and held that the Washington Party candidates were entitled to appear on the November ballot, with the exception of candidates for the water district and the suburban-district commissioners. The board found that the Washington Party had

failed to gather the necessary number of petition signatures from within those districts in support of those candidates.

The objectors appealed the board's decision to the circuit court of Cook County. That court, in an order filed on September 20, 1990, affirmed the board's decision in part and reversed it in part. It held that the failure of the suburban commissioners' candidacy and the failure to present judicial candidates resulted in a failure by the Washington Party to submit a "complete slate" of candidates as required by section 10-2 of the Code, and that therefore all Washington Party candidates were ineligible for the ballot.

This court then reviewed the circuit court's decision pursuant to Illinois Supreme Court Rule 302(b) (134 Ill.2d R. 302(b)), and issued an order filed on October 12, 1990, affirming the circuit court's decision on two separate grounds. First, this court held that the Washington Party candidates could not use the Washington Party party name because it was the name of an "established political party," in violation of section 10-5 of the Code. Second, this court held that the failure of the suburban commissioners' petitions resulted in the Washington Party's failure to file a complete slate of candidates and that, therefore, its nomination papers did not comply with section 10-2. As a result, this court found it unnecessary to address the remaining points raised on appeal, among them being whether the Washington Party's failure to slate judicial candidates was fatal to its candidates' petitions.

Reed v. Kusper, No. 70833, 1992 WL 356050 at *1 (Ill. December 4, 1992) (ruling after remand).

Shortly thereafter, the United States Supreme Court granted certiorari, stayed the order of the Illinois Supreme Court, and ordered that the Harold Washington Party candidates be listed on the November 6, 1992 ballot. On January 14, 1992, the Supreme Court issued an opinion upholding the decision of the Cook County Officers Electoral Board. *See Norman v. Reed*, 112 S. Ct. 698 (1992).

Meanwhile, on October 1, 1990, the appellants[2] filed the instant action in the United States District Court for the Northern District of Illinois alleging that the Cook

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[2] The purported Plaintiffs-Appellants are: The Harold Washington Party; Barbara Norman, a HWP candidate and representative of a class of HWP candidates in the November 6, 1990 election; Timuel Black, a HWP nomination petition signer and representative of a class of signers of HWP nominating petitions for the November 6, 1990 election; Fannie O'Bannion, a HWP supporter and voter; and O.B. Roberts, a HWP petition circulator and representative of a class of circulators of the HWP nominating petitions for the November 6, 1990 election.

This circuit holds that Federal Rule of Appellate Procedure 3(c) requires, as a matter of jurisdiction, that the caption and notice of appeal, read together, must contain the names of all appellants. *See Albedyll v. Wisconsin Porcelain Company Revised Retirement Plan*, 947 F.2d 246, 253 (7th Cir. 1991). The Plaintiffs' "Notice of Appeal" specifically names only the Harold Washington Party as the appellant. Consequently, the other named Plaintiffs in the district court have forfeited their appeal rights. *See Allen-Archery, Inc. v. Precision Shooting Equipment*, 857 F.2d 1176, 1177 (7th Cir. 1988). Although we will continue to refer to the Plaintiffs-Appellants in the plural, the Harold Washington Party is the only valid Appellant.

County Democratic Party and eleven individuals[3] conspired to keep the Harold Washington Party candidates off the November 6 ballot. The Plaintiffs in the district court sought injunctive and monetary relief pursuant to 42 U.S.C. § 1983 for violations of their constitutional rights guaranteed by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. The Complaint also cites 18 U.S.C. § 231 and 42 U.S.C. §§ 1971 & 1985(2) as avenues of relief. Four attorneys filed notices of appearances on behalf of the Plaintiffs. Lead attorney for the Plaintiffs was R. Eugene Pincham, who ran as the Harold Washington Party candidate for mayor during the pendency of this action.

On November 13, 1990, the Defendants filed a motion to dismiss for lack of jurisdiction and for failure to state a claim upon which relief can be granted. *See* Federal Rule of Civil Procedure 12(b)(1) & (b)(6). At a December 3, 1990, status conference a briefing schedule was set whereby the Plaintiffs were to respond to the motion by January 2, 1991. The briefing schedule was memorialized by a minute order. On January 11, 1991, Attorney Robert E. Pincham, Jr. filed a motion seeking an extension of time in which to respond on the ground that his father, the lead counsel, was recovering from surgery. The court granted the motion and ordered the Plaintiffs to respond by February 1. This schedule was also memorialized as a

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[3] The named Defendants are: the Cook County, Illinois Democratic Party; its chairman Thomas Lyons; its attorneys, Michael Carey and Ray Simmon; its candidate for Cook County Sheriff, Michael Sheahan; its supporter, Bonnie McGuire; and Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricks, David Barrera, and Dorothy Reed, objectors to the HWP petitions.

minute order. On January 23, 1991, the Plaintiffs again moved for an extension of time due to the continuing illness of the lead attorney. Again, the motion was granted and the district judge ordered the Plaintiffs to respond by March 1. After that deadline passed with no response being filed, the Defendants moved for entry of an order granting their motion to dismiss for lack of jurisdiction, for failure to state a claim, and for failure to respond to the original motion to dismiss.

The court heard the Defendants' motion on April 5, 1991, at which time the Plaintiffs asked for another fourteen days in which to respond. This time the court denied the request and granted the motion to dismiss. A final judgment dismissing the action with prejudice was docketed on April 8, 1991.

On April 17, 1991, the Plaintiffs served a motion to vacate the April 5 order dismissing the complaint. This motion was heard on April 22, at which time the Plaintiffs finally responded to the motion to dismiss. In a July 12, 1991, memorandum opinion, the district court decided that this motion was untimely for purposes of Federal Rule of Civil Procedure 59(e),[4] so it considered the

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[4] The parties have failed to note that, while the motion to dismiss was granted on April 5, judgment was not entered on the docket until April 8. *See* Federal Rules of Civil Procedure 58 & 79(a) (a judgment is effective only when set forth as a separate document and entered on the docket). Therefore, excluding weekends, the motion to vacate was filed within the ten day time limit specified in Rule 59(e). Nevertheless, the Plaintiffs vehemently denied that their motion was brought pursuant to Rule 59(e). *See* Plaintiffs' Answer to the Defendants' Objections to Plaintiffs' Motion to Vacate the Order of April 5, 1991

motion under Rule 60(b) and found that the Plaintiffs had not established mistake, surprise, inadvertence, excusable neglect or any other exceptional circumstances. Therefore, the motion to vacate was denied.

On July 19, 1991, the Plaintiffs filed a notice of appeal from the court's order of July 12. The principal issue before us is whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment of dismissal under Rule 60(b). Because we conclude that he did not, we affirm.

B. CLASS ALLEGATIONS

As a threshold matter, the Plaintiffs point out that, because this case was filed as a Class action, the district court erred when it dismissed the complaint with prejudice without addressing the issue of class certification or notifying the putative class. *See* Federal Rule of Civil Procedure 23(c)(1). This argument raises the question of whether there is a final judgment over which this court has jurisdiction. *See* 28 U.S.C. § 1291. If the district court has indicated that it contemplates additional proceedings to address the class issue, its judgment is not final for purposes of appeal.

In this case the district court never addressed the class certification issue and did not specifically reserve that question. Our cases hold that, absent a reservation of the class certification issue, the district court's failure to

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Dismissing Plaintiffs' Complaint at 1-2. Therefore, we cannot say that the district court erred in applying Rule 60(b).

certify the class does not render the district court's judgment nonfinal, but merely limits the scope of the judgment in that the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants. *See, e.g., Rutan v. Republican Party,* 868 F.2d 943 (1989) (en banc), *aff'd in part and rev'd in part on other grounds,* 497 U.S. 62 (1990); *Currie v. Diamond Mortgage Corporation,* 859 F.2d 1538 (7th Cir. 1988); *Gomez v. Illinois State Board of Education,* 811 F.2d 1030 (7th Cir. 1987). Accordingly, we have jurisdiction to consider this appeal.

C. RULE 60(b)

We now turn to the issue of whether the district judge abused his discretion in denying the Plaintiffs' motion to vacate the judgment under Rule 60(b). Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer

> equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

It is well-established the Rule 60(b) relief "is an extraordinary remedy and is granted only in exceptional circumstances." *C.K.S. Engineers, Inc. v. White Mountain Gypsum Company*, 726 F.2d 1202, 1205 (7th Cir. 1984). Because district courts must be able to control their own dockets, we give them wide latitude in declining Rule 60(b) motions and review such decisions only for an abuse of discretion. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 228-29 (7th Cir. 1991). An abuse of discretion can be found only where " 'no reasonable person could agree with the district court.' " *Nelson v. City Colleges of Chicago*, 962 F.2d 754, 755 (7th Cir. 1992) (quoting *McKnight v. United States Steel Corporation*, 726 F.2d 333, 335 (7th Cir. 1984)).

At the hearing held on April 5, 1991, the district court did not address the merits of the Defendants' motion to dismiss. Instead, the judge recounted the procedural history of the case, including the two extensions of time granted to the Plaintiffs and their failure to file a response to the motion despite the appearance of four lawyers on their behalf. After chastising the Plaintiffs for this delay and inaction, the judge granted the motion to dismiss. Although the Defendants moved for dismissal on the merits, it is apparent from the judge's remarks that the motion to dismiss was granted pursuant to Federal Rule of Civil Procedure 41(b), which provides that:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The Plaintiffs then filed their motion to vacate the judgment which was subsequently entered on April 8. The Plaintiffs argued that they had a meritorious response to the motion to dismiss; that the Defendants had shown no prejudice; and that their failure to file a timely response to the motion was not willful but was occasioned by the lead counsel's illness and his campaign for the office of mayor of Chicago.

It is July 12 memorandum opinion the court ruled that the Plaintiffs had failed to establish grounds of "mistake, surprise or excusable neglect." As he denied the motion to vacate, the judge observed that, while the lead counsel might have been unable to respond, the other three attorneys who appeared for the Plaintiffs had wholly failed to explain their failure to answer the motion to dismiss.

Following the conclusion of these proceedings in the district court, the only timely notice of appeal filed by the Plaintiffs was from the July 12 order denying their motion to vacate under Rule 60(b). An appeal from the denial of a Rule 60(b) motion does not trigger appellate review of

the merits of the underlying judgment.[5] *See Kagan v. Caterpillar Tractor Company*, 795 F.2d 601, 607 (7th Cir. 1986). Thus, all that is before this court is the district court's refusal to vacate its judgment.

Our review of the record does not reveal that the district court relied on forbidden factors or failed to consider any important relevant factor in denying the Plaintiffs' motion to vacate. *See Tolliver v. Northrop Corporation*, 786 F.2d 316, 319 (7th Cir. 1986). The only ground listed in Rule 60(b) addressed by the Plaintiffs was "excusable neglect." *See* Federal Rule of Civil Procedure 60(b)(1). And, as the district judge pointed out, what may arguably have been excusable neglect on the part of the lead counsel could not excuse or explain the neglect on the part of the other three counsel of record.

The Plaintiffs vehemently maintain that they had a meritorious response to the motion to dismiss, but the existence of a meritorious defense, standing alone, does not excuse carelessness and disregard for court orders and schedules. *See Zuelzke Tool & Engineering Company, Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 230 (7th Cir. 1991). Similarly, the lack of prejudice to the Defendants is not a factor which lends any weight to the Plaintiffs' position. When a court dismisses for failure to prosecute, it is primarily for the purpose of controlling its own crowded docket and for the purpose of punishing dilatory conduct and deterring those who might be

---

[5] Consequently, the Plaintiffs' argument that the court never *ordered* them to file a brief prior to dismissal is both incorrect and irrelevant as they can no longer appeal from the judgment of dismissal under Rule 41(b) for want of prosecution.

tempted to engage in such conduct. *See National Hockey League v. Metropolitan Hockey League Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam).

In this instance the Plaintiffs had four months to argue the merits of their claims. Offering their response only after judgment had been granted did not demonstrate the diligence or extraordinary circumstances necessary to invoke Rule 60(b). When a party abdicates its responsibilities through its attorneys' carelessness, relief from judgment under Rule 60(b) is not warranted. *See Zuelzke*, 925 F.2d at 229; *Western Transportation Company v. E.I. DuPont de Nemours and Company*, 682 F.2d 1233, 1236 (7th Cir. 1982). While the facts in this case are not as egregious as some, this court cannot conclude that the district judge abused his discretion or was unreasonable in finding that the Plaintiffs had not established excusable neglect. Therefore, the district court's judgment denying relief under Rule 60(b) Is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX

(ii)

THE MEMORANDUM OPINION OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

THE HAROLD WASHINGTON PARTY, et al.,	)	No. 90C5731
Plaintiffs,	)	HONORABLE CHARLES P. KOCORAS
vs.	)	
THE COOK COUNTY, ILLINOIS DEMOCRATIC PARTY, et al.,	)	
Defendants.	)	

Memorandum Opinion filed June 15, 1991

This matter is before the court on the plaintiffs' motion to vacate this court's dismissal of the case. For the reasons discussed below, the motion is denied.

BACKGROUND

The plaintiffs filed this action on October 9, 1990 alleging that the defendants had engaged in a conspiracy to keep Harold Washington Party candidates off the November 6, 1990 Cook County ballot. The defendants filed a Rule 12(b)(6) motion to dismiss the complaint on November 13, 1990 and a brief in support of that motion

on November 30, 1990. The plaintiffs were given until January 2, 1991 to file a response to the motion. The deadlines passed without a word from the plaintiffs. On January 11, 1991 the plaintiffs asked to have until January 18, 1991 to file their response. The extension was granted, and the plaintiffs again missed the deadline. Ten days later the plaintiffs returned to court and requested a month and a half to file their brief. This new March 1, 1991 was missed in complete silence.

On April 5, 1991, a full month after the latest deadline, the defendants moved to dismiss the action. Noting the right of litigants to diligence on the part of their opponents in resolving disputes, this court granted the defendants' motion and entered final judgment against the plaintiffs.

Seventeen days later the plaintiffs, through one of their attorneys, R. Eugene Pincham, Sr., filed the instant motion to vacate the April 5, 1991 judgment. Mr. Pincham underwent surgery at the end of November 1990. Then, during his recuperation, he was asked to help Danny Davis in the latter's bid for the 1991 Democratic mayoral nomination. When that bid failed, the Harold Washington Party asked Mr. Pincham to run for mayor under its banner. Mr. Pincham states that these events so occupied his time that he was unable to file a timely response to the defendants' Rule 12(b)(6) motion.

DISCUSSION

A. Legal Standard

The Seventh Circuit and courts of this district adhere to a policy favoring resolution of disputes on the merits.

Chandler Leasing Corp. v. UCC, Inc., 91 F.R.D. 81, 83 (N.D. Ill. 1981). The preference for meritorious resolution of disputes must, however, be balanced against the court's duty to protect and promote efficient litigation that will accrue to the benefit of all litigants. *See North Central Illinois Laborers' District Council v. S.J. Groves & Sons Company*, 842 F.2d 164, 167 (7th Cir. 1980); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984). To effectively perform this duty, courts have the inherent power to dismiss a case "in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not." *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983).

Relief from a final order of dismissal may be obtained only upon a showing of exceptional circumstances as defined by Rule 60(b). *Railroad Maintenance Laborers v. American Railroad Construction Co.*, 96 F.R.D. 433, 435 (7th Cir. 1985). Such circumstances consist of

> (1) mistake, inadvertance [sic], surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misrepresentation or other conduct of the adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

B. Analysis

Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the

plaintiffs' three months to respond to the defendants' motion to dismiss. Finally, after a month a silence following the plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of "mistake, surprise or excusable neglect." The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to a motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied.

/s/ Charles P. Kocoras

In the

United States Court of Appeals

for the Seventh Circuit

No. 91-2712

THE HAROLD WASHINGTON PARTY, et al.,
Plaintiffs-Appellants,

vs.

THE COOK COUNTY DEMOCRATIC PARTY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 90 C 5731
The Honorable **Charles P. Kocoras,**
Judge Presiding.

JOINT BRIEF OF APPELLEES

The Cook County Democratic Party, Thomas Lyons, Individually and in his Official Capacity as Chairman of the Cook County Illinois Democratic Party, Tom Carey, Michael Carey, Michael Sheahan, Raymond F. Simon, Bonnie McGuire, Valerie A. Sutton, Patton L. Feichter, Ervin S. Ricks, David Barrera and Dorothy Reed

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* * *

STATEMENT OF THE CASE

On April 5, 1991, the district court dismissed the complaint with prejudice because of a four month failure of the appellants to file any response to the appellees' Motion to Dismiss. On July 12, 1991, the District Court denied the appellants' Motion to Vacate the Dismissal, finding that no showing of "excusable neglect" was made by the four attorneys who represented the appellants and that the appellants, therefore, failed to demonstrate the exceptional circumstances necessary to justify relief from a judgment under Rule 60(b). Appellants appealed from that Order only.

STATEMENT OF FACTS

Appellants' "statement of facts" is plainly violative of Rule 28 of this Court. It is not a "fair summary without argument or comment". It is not limited to "the facts relevant to the issues presented for review". Rather, it is deceptive and materially misleading.

The only Order on review is the Order of July 12, 1991, which denied the appellants' Motion to Vacate the Judgment Order of April 5, 1991. The Order of April 5, 1991 was not appealed and, therefore, is not before this Court. Nonetheless, appellants devoted sixteen pages of their "statement of facts" (pp. 4-19) to events either relating to the Complaint or to collateral events wholly unrelated to this appeal. Moreover, the characterization of those events is substantively untrue. *See:* Memorandum in Support Of All Defendants To Dismiss Complaint

(Appendix hereto, pp. 1a-6a and the Appendix to that Memorandum [R., Vol. 1 of 1, p. 23])

A fair summary of the facts relating to the issues on appeal is as follows:

The Complaint was filed on October 9, 1990 alleging that appellees had engaged in a conspiracy to keep the Harold Washington Party candidates off the November 6, 1990 Cook County ballot. (Memorandum Opinion, p. 1, App., p. 35)[1] All twelve appellees filed a single Rule 12(b)(6) Motion to Dismiss the Complaint on November 13, 1990 and a single brief in support of that Motion on November 30, 1990. (Memorandum Opinion, p. 1, App., p. 35) The names of four attorneys appear on the Complaint as counsel for appellants (Compl., pp. 31-32, R. 1-1, Pleading Vol. 1 of 1) Each of the four attorneys filed a written appearance for appellants. (R. 1-3, Pleading Vol. 1 of 1)

On December 3, 1990, Nathaniel Howse, one of four attorneys representing the appellants appeared before the district court and requested thirty days within which to respond to the Motion to Dismiss. (Supp. R. 58-3, p. 2) Thereupon, the district court entered an Order granting appellants until January 2, 1991 to answer the Motion to Dismiss and set February 15, 1991 for ruling. (R. 24, Pleading Vol. 1 of 1)

The deadline of January 2, 1991 passed without a word from appellants. (Memorandum Opinion, p. 1, App. p. 35) On January 11, 1991, nine days later, the appellants,

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[1] App. refers to the Appendix filed by Appellants.

through another of their attorneys, Robert E. Pincham, Jr., requested an extension of time to respond to the Motion to Dismiss to January 18, 1991. (R. 28, Pleading Vol. 1 of 1) The district court entered an Order, by mail, granting the extension of time. (R. 29, Pleading Vol. 1 of 1)

Again, appellants missed the deadline. (Memorandum Opinion, p. 2, App. p. 35) On January 22, 1991, after the due date, appellants, through R. Eugene Pincham, Sr. requested a further extension to March 1, 1991. The motion for extension was filed with the Clerk on January 22, 1991, but not presented to the district court until January 28, 1991. (R. 34-36, Pleading Vol. 1 of 1) The transcript of January 28, 1991 reflects the following: (Supp. R. 58-4, Vol. 4 of 5)

> "MR. PINCHAM: Good morning, your Honor. If the Court please, I am here on behalf of Harold Washington's motion to extend the time in which to respond to the motion of defendants to dismiss, and we are asking for a March date within which to do that.
>
> * * *
>
> THE COURT: How is your health, Mr. Pincham?
>
> MR. PINCHAM: Well, it aint' what it ought to be. I would like for it to be better than it is, but I am surviving.
>
> THE COURT: Do you have any objection to this?
>
> MR. SPITALLI: I do, your Honor. I am sorry that Mr. Pincham has not been well, but I feel constrained to point out to the Court that there are four attorneys who represent the plaintiff in

> this case. The motion to dismiss has been on file since November 13th. We are now beyond sixty days. It is our firm conviction, your Honor, that this case was irresponsibly filed and should not be left on file for any longer than is necessary. So, we object to this continuance. It is interesting to me that the other three attorneys filed nothing before the Court to indicate what they have been doing over this past 60-some days.
>
> THE COURT: Well, it is a long time. Other lawyers could have done it. I take it you are lead counsel, Mr. Pincham?
>
> MR. PINCHAM: Well, the other lawyers, really – this is a pro bono case. The other lawyers who really were in the case attempted to aid and assist me during the time when we were in the midst of a campaign.
>
> THE COURT: I will grant the motion."

On that same date, the district court issued a minute order providing:

> "Plaintiffs' motion for an extension of time to March 1, 1991 to answer defendants' motion to dismiss is granted. Replies are due March 15, 1991. Ruling reset to April 17, 1991 at 9:30 a.m. (R. 37, Pleading Vol. 1 of 1)

The new March 1, 1991 date was missed in complete silence. (Memorandum Opinion, p. 2 App. 35) On April 3, 1991, a full month after the latest deadline, appellants were personally served with notice of appellees' motion for the entry of an order granting the motion to dismiss because of appellants' " failure to file any Memorandum in opposition to the Motion to Dismiss and for all of the

reasons set forth in the Defendants' Motion and Memorandum in support". (R. 41, pp. 1-2, Pleading Vol. 1 of 1) The motion was presented to the district court on April 5, 1991. (R. 41, Pleading Vol. 1 of 1) On that date, Robert Pincham, Jr. appeared on behalf of appellants. The transcript reflects the following: (R. 49, pp. 2-4)

> "MR. PINCHAM: Good morning, your Honor, Robert Pincham, Jr., on behalf of plaintiffs.
>
> MR. SPITALLI: Your Honor, it has now been four months. The time has expired. We have gotten no response to our motion to dismiss. No requests for extension of time were timely filed. We heard the last time that Mr. Pincham, Sr. was ill. We are going to hear today that he has been busy. In the meantime, there are four lawyers who represent the plaintiffs in this case. This is a frivolous lawsuit. I think it is time it should be brought to an end.
>
> MR. PINCHAM: Well, let me start with the last point first, if I may. There is nothing whatsoever frivolous about our lawsuit. Clearly, there was a period of time when lead counsel on the case was ill. He came before the Court and made such representations to you. The matter was then set down for another date. As the Court is well aware, R. Eugene Pincham, Sr. has been very publicly involved in other activities in recent days. If the Court will allow me fourteen days, I will have a response in here.
>
> THE COURT: I will not do that. I will not do that. I will tell you why. The motion was filed in November. There was a substantial period of time within which to answer, I think, in January. There was no response filed and I extended the

time considerably in light of your father's situation, although there were other lawyers who could have worked on it. The answer was due March 1st?

MR. PINCHAM: That is correct.

* * *

THE COURT: It is now April 5th. Nothing has happened from March 1st to April 5th. I allowed an extraordinary amount of time to have this answered. The motion was filed four months ago. And I appreciate the fact that your father had some health problems, although obviously he has been restored to substantial health. I have the highest regard for your father as a trial lawyer – I tried a number of cases against him – but the judicial business has to have a place in life here; and, I think four months, in light of, I think, the substantial extension I have granted and in light of, basically, the deadline being ignored for – the last deadline being ignored for a period of essentially a month – is simply inexcusable – inexcusable. I do not do business that way and I think at this point in the game, the motion should be granted.

They are entitled to some consideration of their motion, which they filed and they took some time to do that. It is substantial. But we cannot, simply because there are other things that occupy people, in light of the substantial time I have allowed to file an answer to this motion, I just cannot and will not allow business to be conducted that way.

I am sorry about that and I do not mean to short-change anybody on the merits of this case, but if it was the first time, I would understand

> it. But it is the second time and after a substantial, substantial allowance of time. And then for no one to come in here, after the deadline has come and gone, and say, "I need more time, I am doing this" or "I am doing that," and with a number of other lawyers on the case who could have worked on this, who undoubtedly worked on preparing the complaint in the first instance, there is no excuse for that. The motion is granted."

The district court thereupon issued the following minute order and Judgment:

> "Defendants' motion for entry of an order granting motion to dismiss is granted. For the reasons stated in open Court this cause is hereby dismissed with prejudice. Ruling set for April 17, 1991 is stricken as moot. Final Judgment entered." (R. 43, Pleading Vol. 1 of 1)

> "It is Ordered and Adjudged that this cause of action is hereby dismissed with prejudice. Each party to take nothing. Final Judgment entered." (R. 42, Pleading Vol. 1 of 1)

On April 22, 1991, seventeen days later, appellants, through R. Eugene Pincham, Sr., filed a motion to vacate the judgment order of April 5, 1991 and for leave to file an answer and memorandum to the motion to dismiss. The transcript of April 22, 1991 reflects the following: (Supp. R. 58-5, pp. 2-5)

> "MR. PINCHAM: If the Court please, on the 5th of April your Honor entered an order dismissing the plaintiff's complaint because of the plaintiffs' failure to file an answer to the defendants' motion to dismiss. This matter before your Honor this morning is the plaintiffs'

motion to vacate that dismissal order of April 5th, to grant the defendant leave to file its affidavit of certification in support of the motion to dismiss, for leave to file its answer to the defendants' motion to dismiss and for leave to file an answer to the defendants' memorandum.

We have submitted written documents in support of the motion. The only thing that I would like to add or emphasize, one, the fact that we state in our motion that the defendants were not in any way prejudiced by their delay in our failure to file the answer to their motion to dismiss, and they do not allege any prejudice by our failure; and, secondly, that our failure was not willfull, but it was occasioned by the fact that I was engaged, as I state in the motion in recuperating and in campaigning for two particular offices.

I apologize to the Court and to counsel, but we very strongly urge that the defendants were not in any way prejudiced, that they don't claim to be prejudiced, that they should not receive a windfall because of the labors under which I was laboring.

Let me point out further to you that I am the only counsel in the case, and I am serving pro bono. The plaintiffs do have a good meritorious claim against the defendants, but we urge that this case should not be disposed of by a windfall based upon the facts and circumstances of this case and would ask your Honor to vacate this order of April 5th and deny the defendants' motion to dismiss because we do submit it is frivolous and without any merit whatever.

* * *

MR. SPITALLI: We pointed out the last time, your Honor, there are four lawyers involved here representing the plaintiffs in this case.

THE COURT: Have more than – are there not more appearances on file than yours, Mr. Pincham?

MR. PINCHAM: I don't think there are, but even if – I am reasonably positive, but they are merely – if they are, they were just merely there to help me because of the condition in which I was laboring at the time.

MR. SPITALLI: Four lawyers' names appear on this complaint, your Honor.

MR. PINCHAM: I am the only attorney in the case, Judge, and none of them have received one quarter or one dime, not one penny. More importantly –

THE COURT: We will take it up. I mean, whether they get paid or not is a different proposition –

MR. PINCHAM: I agree.

THE COURT: – from whether or not they have some responsibility to proceed with the case.

MR. SPITALLI: Your Honor, I think that the memorandum which Mr. Pincham seeks leave to file today underscores very dramatically that this case, as I indicated earlier, is frivolous. There isn't a single citation before you in that memorandum. That completely justifies, your Honor's dismissal of this matter with prejudice two weeks ago.

> Mr. Pincham files an affidavit in which he claims to be busy. He apparently has time for lots of other things except this lawsuit, including the filing of a second lawsuit in this court during the period in which he was involved in campaigning. This lawsuit is irresponsible, Judge, and should not have been filed and should not be left on file one more hour than necessary.
>
> THE COURT: Well, I think what I am going to do at this point is I would like to get any defendants' position in writing to the present motion to vacate. I do not know whether you have addressed whether even this motion is timely or not. I do not know whether it is or not. But, in any event, you can address that in your response, and I will give you a chance to reply."

Appellees' written objections to the motion to vacate were filed on April 26, 1991. The objections provide in pertinent part:

> "(c) No excusable neglect has been established under Rule 60(b). As mentioned earlier, four attorneys represent the plaintiff. None of them has ever withdrawn. On April 5, 1991, when this case was dismissed, Robert E. Pincham, Jr. appeared on behalf of plaintiffs. On April 22, 1991, when the motion to vacate was presented, R. Eugene Pincham, Sr. appeared on behalf of plaintiffs. While it was claimed for the first time by R. Eugene Pincham, Sr. that he, alone, represented the plaintiffs, his claim is contradicted: (i) by the record which demonstrates that four attorneys represent the plaintiff; (ii) by the envelopes in which the motion was served, which bear the name of Robert E. Pincham, Jr., Ltd. and (iii) by the fact that other attorneys, either

> Mr. Howse or Mr. Thomas, have appeared in open Court on this case. The only excuse offered by the plaintiffs is the apparent ill health and political activities of one of their attorneys, R. Eugene Pincham, Sr. No excuse is or has been offered by the remaining three attorneys. Further, the affidavit of R. Eugene Pincham, Sr. itself demonstrates the lameness of the excuse he offers. He claims he was discharged from Mercy Hospital for the last time on December 6, 1990 and was thereafter 'recuperating'. However, his affidavit goes on to recite that 'during his recuperation' and through February 26, 1991, he was assisting Danny Davis in the mayoral primary and then, apparently recuperated, ran for Mayor in the election held April 2, 1991. That scenario simply does not wash and fails to justify the utter and continual disregard of the Orders of this Court and the Federal Rules of Civil Procedure, by not only R. Eugene Pincham, Sr., but by the other three attorneys representing the plaintiffs as well."

Appellants did not contest any of the facts set forth in appellees' objections. Aside from rhetoric, the essence of appellants' response was:

> "We characterize the defendants' reliance on plaintiffs' delay in filing their answer to the defendants' motion to dismiss plaintiffs' complaint as trivia certainly not out of any disrespect by plaintiffs or their attorney for the Court rules, because had plaintiffs' attorney had the slightest notion that defendants would resort to such quibbling, he assures this Court that he would have prioritized his preferences differently and timely responded to the defendants' dismissal motion. Most assuredly, he would not

> have devoted his complete time and energies to recuperating and to Davis' and his campaigns for Mayor of the City of Chicago. We also assess the defendants' reliance on plaintiffs' delay in the case at bar as nitpicking because no harm or prejudice has thereby befallen them." (R. 50, p. 3, Pleading Vol. 1 of 1)

At no time did any of the other three attorneys representing appellants offer any reason for their continued failure to be responsive to the orders of the district court.

On July 12, 1991, the district court issued its Memorandum Opinion denying appellants' motion to vacate. The Memorandum Opinion provides in pertinent part: (Memorandum Opinion, App. 36-37)

> "The Seventh Circuit and courts of this district adhere to a policy favoring resolution of disputes on the merits. *Chandler Leasing Corp. v. UCC, Inc.*, 91 F.R.D. 81, 83 (N.D. Ill. 1981). The preference for meritorious resolution of disputes must, however, be balanced against the court's duty to protect and promote efficient litigation that will accrue to the benefit of all litigants. *See North Central Illinois Laborers' District Council v. S. J. Groves & Sons Company*, 842 F.2d 164, 167 (7th Cir. 1980); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202 (7th Cir. 1984). To effectively perform this duty, courts have the inherent power to dismiss a case 'in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not'. *Stevens v. Greyhound Lines, Inc.*, 710 F.2d 1224, 1230 (7th Cir. 1983).
>
> Relief from a final order of dismissal may be obtained only upon a showing of exceptional

circumstances as defined by Rule 60(b), *Railroad Maintenance Laborers v. American Railroad Construction Co.*, 96 F.R.D. 433, 435 (7th Cir. 1985.)

* * *

Although the plaintiffs' prosecution of this case has been marked by delays and omissions, this court gave the plaintiffs' three months to respond to the defendants' motion to dismiss. Finally, after a month of silence following the plaintiffs' third failure to meet the filing deadline, this court determined that the interests protected through the enforcement of efficient litigation outweighed this court's preference for resolving disputes on their merits. We accordingly entered final judgment, dismissing the case with prejudice.

The plaintiffs now ask this court to vacate that judgment on the grounds of 'mistake, surprise or excusable neglect'. The plaintiffs argue that because one of their attorneys was occupied with surgery and then with campaigning, dismissal of the case upon their four month failure to file an answer to motion to dismiss constituted an abuse of discretion. However, the plaintiffs' argument ignores the fact that three other attorneys have filed appearances and represented the plaintiffs in court. No explanation is given as to why the other attorneys were unable to prepare the needed response or to at least give timely notice to the defendants and to this court that the response would not be immediately forthcoming. Thus, the plaintiffs have failed to adequately show such exceptional circumstances as would justify a vacation of final judgment, and the motion is denied."